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Heikki Pihlajamäki

How Much Context Can We Afford? A Comment on Peter Oestmann

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Heikki Pihlajamäki

How Much Context Can We Afford? A Comment on Peter Oestmann

In his incisive and pleasantly provocative contribution, Professor Peter Oestmann distinguishes between three different kinds of sources commonly drawn upon by legal historians. These sources, according to Oestmann, also mark three different research approaches often employed within this field of research. Some orient themselves toward norms, others toward the history of legal scholarship, while the third group is mainly interested in legal practice.

Oestmann's tripartite division is helpful, and I find it easy to comprehend. This probably has something to do with the modern theory of legal sources that we, legal historians trained in law, have had imprinted in our brains: written law, case law and literature. As legal historians, we end up reproducing this theory. Obviously, the dividing lines between the sources are not always clear. While legal practice is not difficult to distinguish from the other two, *Normengeschichte* and *Wissenschaftsgeschichte* sometimes overlap. For instance, Oestmann's example of the glossators is, in my opinion, not a clear case of *Normengeschichte* – although it could be included in that category, as well. The difficulty in categorization arises because legal scholarship was so decisive in the formulation of roles during the Middle Ages. Much of the work on the glossators could just was well be regarded as *Wissenschaftsgeschichte*.

For Oestmann, the choice of methodological approach is mainly a matter of preference: taste determines which sources the researcher will use. This might hold true for a German researcher working on late medieval and early modern sources, given the sheer abundance of material in each of the categories mentioned above. However, the same cannot be said if we move geographically further away from the heart of *ius commune* regions of Europe, or if we go back much further in time in any part of the world. Medieval Swedish law is a good example. In the northernmost parts of Europe, only starting in the seventeenth century did legal literature emerge in any significant sense, and prior to the end of the fifteenth century – the period from which the systematic series of Stockholm court books originate – not much regarding court practices has survived. If one wants to understand medieval Swedish law, it is indispensable to have recourse to the medieval legislation.

This brings me to an important point. Even though we may sometimes be forced to rely on only one type of domestic legal source, this does not mean that we have no other means of attempting to understand a given source. Oestmann mentions that a legal historian interested in *Dogmengeschichte* will rarely feel the need to place his or her findings in a social context. Unfortunately, this is the case although social context is almost always relevant when trying to understand what a particular legal scholar »really said,« how a particular legal norm was probably interpreted, or whether it was followed at all. Examples abound: let me just mention the social and political context that surrounded the Warren Court's interpretations of racial minority rights in the United States during the 1950s and 1960s.

The three kinds of sources and research approaches do not stand on equal footing, as Oestmann rightly emphasizes. This is especially true if legal literature or statutory law are taken as mirrors of the »living law« – which is sometimes the case, especially when general historians write legal history. As Oestmann writes, the danger lessens considerably when we get to the nineteenth century and the supreme reign of the written statute. One would expect both scholarship of legal dogmatism and legal practice to remain very close to the written law – although for the latter this might be overstating the case a little.

Interests other than those serving and slavishly portraying legal practice often intervene, especially when it comes to legal scholarship. The desire to develop the law has often led legal scholarship far beyond actually describing legal practice; what else can one say about much of nineteenth century German *Pandektenrechtsliteratur*? Following academic fashion, legal authors sometimes wish to portray themselves as intellectuals, as is often the case with those writing dissertations on early modern theory. In Sweden, this led to the over-characterization of Swedish law as »Romanized« – at least, more much than it actually was.

The question of what law »actually« is leads us to the classical discussions about legal realism, legal positivism, and natural law. Leaving aside for the moment all attempts at theoretical finesse, I would still claim that, by appeal to some form of common sense, legal practice tells us something essential about the law. If cursing one's parents were punishable by death according to the written law, it would make a crucial difference if in legal practice the head of the accused, nevertheless, still stayed on his shoulders. Therefore, if one had to choose between the normative legal sources and those depicting legal practice, one should opt for the legal practice. A better option, assuming one has sufficient resources, would be to choose both norms and practice, and then highlight the interesting differences. And if the possibility exists, it would be even better if one can explain the differences by putting the normative sources and the judicial practice into a proper social and comparative context.

But how many sets of sources and contexts can we handle at the same time? Reading archival documents is, indeed, time-consuming, and it may be difficult to go through a similar amount of literature and normative material to that of a researcher with no archival interests. However, if one's research interests are associated with legal change, it is hard to see how one could manage without building up an appropriate social context to help grasp the change. Few legal changes can be explained solely in terms of law's internal movements. Take, for instance, the emergence of anti-formalist legal movements in the early twentieth century: *Freirechtsschule,* legal sociology, and Scandinavian legal realism. Surely they cannot be understood without some reference to the changes in the surrounding society.

Social context, that great legacy of the 1970s, has recently been accompanied by comparative contexts – an equally great legacy of the contemporary research world. Such contexts need not be the same as meticulous comparative combinations, in which every aspect of research object A is compared with corresponding aspects of research object B. To save us from legal historical parochialism, it is often enough if we simply recognize the larger international aspects of the phenomenon we are dealing with. For instance, looking at the European anti-formalist movements as related to American legal realism will help us to understand the nature of the phenomena on both sides of the great ocean.

Is this all too much to ask for? As Oestmann warns, trying to handle too many different kinds of sources (and contexts, I might add) may force one to narrow down – geographically and temporally speaking – the research question too much. Hopefully, this can be avoided because today's legal history is by nature interdisciplinary, international, and comparative. Legal history has, therefore, become more demanding, yet, at the same time, it has become more relevant and much more fun.

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